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ABSTRACT

Due process in employment practices is guaranteed to school employees to the extent that they have constitutionally protected liberty and property interests in their employment. This paper reviews the responsibilities of school business officials at every stage in the employment process, from the original application for employment through termination and the responses that may follow termination. The paper first describes questions that can and cannot be asked of applicants. The hiring process is considered next, with particular attention paid to the screening of applicants and the thorough orientation of new employees. The paper's discussion of on-the-job procedures focuses on probationary periods, evaluations, and oral and written reprimands. The procedures to be followed if termination becomes necessary are spelled out next. The paper then considers the actions that terminated employees may take and reviews the questions that administrators must be able to answer positively if they are to be assured that they have followed due process adequately. (PGD)

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DUE PROCESS IN THE TERMINATION OF NON-CONTRACT PERSONNEL

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Due process is the right that is guaranteed by the Fifth and Fourteenth Amendments. Simply stated, due process is the concept of fair play. School business administration must be able to answer "yes" to each of the questions below in order to afford due process:

1. Was the rule, conduct, procedure, directive, or order known to the employee; and was it one that could be considered reasonable and related to the efficient, orderly operation of the school or department?

2. Was the employee notified relative to the expected behavior in this regard, and was there prior knowledge and indication of probable disciplinary consequences for failure to comply on the part of the employee?

3. Was there a fair and objective investigation of the circumstances and the facts prior to discipline; and, in fact, was there clear violation or disobedient action?

4. Is there specific data, documentation, and other information that exists to substantiate and verify the situation?

5. Does the disciplinary action taken reflect a degree that is consistent with the seriousness and nature of the offense?

6. Has the employee's previous record been considered, and has that person received treatment that is consistent with the treatment of others who have been disciplined for similar circumstances?

There is no one definition of due process. Due process will vary with each circumstance. However, in each circumstance, the same questions must be answered:

> Application of this prohibition requires the familiar two-stage analysis: we must first ask whether the asserted individual interests are encompassed within the Fourteenth Amendment's protection of "life, liberty, or property"; if protected interests are implicated, we then must decide what procedures constitute "due process of law."[1]

Usually in a school setting few circumstances exist which threaten life, but the denial of liberty rights and property rights can exist. The denial of a liberty right would be the denial of the right of seeking a livelihood by citing negative work habits.[2] The denial of property rights would include denial of employment as assured by some legal contract.

School boards need to have in the policies due process procedures which conform to the constitutions and statutes of the Federal and state governments.

Classified employees are usually under no written contract and therefore shall have no property right in their employment and may be dismissed at will.[3 & 4]

The board, though, may terminate the employment relationship at any time, for any reason, except as otherwise provided by law.[5]

The school business administrator is assigned the task of terminating the employment of unsatisfactory personnel. Unfortunately, the school business administrator usually has little or no training

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1 Ingram v. Wright, 430 U.S. 651, 672 (1977).

2 Coen v. Boulder Valley School District, 402F Supp. 1335 (D. Colo. 1975).

3 Horn v. Builders Supply Co. of Longview, 401 S.W. 2d 143 (Tex. Civ. App. 1966).

4 Bichsel v. Heard, 328 S.W. 2d 462 (Tex. Civ. App. 1959)

5 Sabine Pilot Service, Inc. v. Hauck, 687 S.W. 2d 733 (Tex. 1985).

in personnel matters. He is usually uninformed about complying with confusing laws. He is, however, concerned with protecting the rights of the employees. He must, therefore, go back to our original concept of due process, i.e., fair play. Since the classified employee has no property rights, the school business administrator is faced with a legal as well as an ethical problem.

Due process begins with the application of a classified employee and carries through every aspect of the employee's employment and ends with the employee's termination. In order to follow this due process, this paper will take us through the following steps:

1. Application procedures
2. Hiring process
3. On-the-job procedures
4. Termination
5. Possible repercussions

APPLICATION PROCEDURES

School business administrators are faced with the problem of obtaining the best qualified person for the job. An application form must be developed which can be used to identify job related qualities. This application cannot ask questions related to sex, race, creed, religion, color, national origin, mental and physical disability, marital status, or record of bringing complaints against other employees.

Certain information concerning the applicant can be asked. These questions fall into ten categories as follows:

1. Personal
    a. Name
    b. Social security number

c. Address

d. Telephone number if available

e. U. S. citizenship

2. Position

a. Custodial

b. Food service

c. Maintenance

d. Paraprofessional

e. Other

3. Employment history

a. List of former employers

b. Dates of employment

4. Education

a. High school

b. College

c. Other

5. Skills

a. List any skills pertinent to the job

b. List any training

6. References

a. List any references

b. List addresses

c. List telephone numbers

7. Military

a. List any military service

b. A disclaimer must be included which states that "less than an honorable discharge is not necessarily a bar to employment"

8. Criminal record

   A disclaimer must be included which states that "conviction of a crime is not necessarily a bar to employment"

9. Other duties

   a. Drivers license

   b. Relationship to board members

10. Signature

HIRING PROCESS

This information can then be studied by the school business administrator in an attempt to select the most qualified applicant for the job. The administrator must take the time to check all references and former employers. This is an extremely important part of screening prospective employees. The better the job of employee selection, the fewer problems in the future. Once the applicants have been screened, an interview must be held. The administrator must be extremely careful in the interview. Any criteria used, information required, or interview questions asked must be related to job performance. The administrator must always remember that although he has the discretion to choose among candidates with different but equal qualifications, if a prospective employee establishes a case of disparate treatment, the administrator must prove non-discrimination.

Planning is the key to hiring an employee and also the key to preventing problems with that employee in the future. Most problems with an employee come about because of lack of understanding of their role in the organization.[6] The first two questions we asked back on

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[6] Candoli, Carl, School Business Administration (Allyn & Bacon, 1984).

page one to determine if due process had been afforded were: (1) was the rule, conduct, procedure, directive, or order known to the employee? and (2) was the employee notified relative to the expected behavior?

To assure a positive answer to these two questions, a proper orientation process must be followed. During this orientation session with new employees, the following items need to be covered:

1. The State oath of office must be explained and signed by the employee and witnessed by a Notary Public

2. A job description should be given to the employee and discussed. This job description should include the job qualifications, to whom the employee reports, the goal of the job, and the performance responsibilities.

3. An employee information sheet should be given to the employee and explained thoroughly. This information sheet should include such items as:

    1. How employees are selected

        It should be explained at this time that no discrimination because of religion, race, national origin, marital status, or age is practiced

    2. Dress codes

        If certain articles of clothing are required or prohibited, the employee should be told at this time

    3. Work schedule

        The schedule should be explained thoroughly regarding work days and work hours

    4. Overtime pay

        Since this employee is non-contractual, overtime pay is required. The overtime policy should be explained

    5. Pay periods

        Pay calendars should be explained

    6. Jury duty, holidays, vacation, sick leave--school board policies regarding these matters should be discussed

7. Employee benefits

   All benefits such as teacher retirement, insurance, credit unions, etc. should be explained at this time

8. Promotions, raises, and transfers

   The method for selection for promotions, raises, and transfers should be explained

9. Rules of conduct

   Any rules or regulations that the employee is expected to follow should be discussed at the time of employment

Once the job description and employee information sheet has been explained and given to the employee, an acknowledgement of receipt should be signed by the employee and witnessed.

ON-THE-JOB PROCEDURES

Once the employee has completed the orientation, he should enter employment under some probationary status. This will give the administrator a chance to evaluate the employee's understanding of the district's procedures as well as his understanding of the rules and regulations. This time should be used to issue any instructions necessary for the continued employment of the employee.

Each employee should be evaluated at least annually. The evaluation instrument should be tied strictly to the job description. The markings on the evaluation instrument should be discussed with the employee by the individual who performed the evaluation. This evaluation should be used to improve the performance of the employee, not as a reprimand or a termination instrument.

If the employee does, in fact, violate a district rule, regulation, or procedure and a reprimand is necessary, the reprimand should

first be given orally. To properly carry out an oral reprimand, the following steps should be considered:

1. State to the employee that you are issuing an oral reprimand or warning

2. Review the rule, regulation, or procedure which is the basis for disciplinary action

3. State the failure on the employee's part to comply with the rule or regulation

4. Emphasize once again your expectation of the employee

5. Always offer your assistance to help the employee correct the problem and therefore improve

6. Conclude with the indication that failure to comply will warrant further disciplinary action

7. Make a written note or record, include date, time, and action taken

If the employee continues to violate the district rule, regulation, or procedure after the oral reprimand, a written reprimand should be issued. The written reprimand should include the following components:

1. The reprimand must be individually written stating specific material facts such as date, time and place, witnesses to, and actions of the individuals involved

2. The reprimand should include a quotation of the rule, regulation, or procedure that has been violated

3. The reprimand should outline all previous oral or written reprimands

4. The reprimand should be explicit and to the point

5. The reprimand should be stated that this letter constitutes a written reprimand

6. The reprimand should state that the employee is being given another opportunity to improve in performance

7. The reprimand should state that if there is no significant improvement within a reasonable time period, the employee will be subject to further disciplinary action. The administrator must refrain from threats as to what the further action will be.

8. The employee must be given a copy of the reprimand. The employee must sign the reprimand to indicate receipt of the reprimand

9. The employee must be given an opportunity to attach any statements to the reprimand

10. The reprimand must be placed in the employee's official personnel file

TERMINATION

If the employee continues to violate the rule, regulation, or procedure, his employment may be terminated. At the time of termination an exit interview must be conducted. This exit interview should be in writing and contain the following items:

1. Name of employee
2. Social security number
3. Mailing address
4. Job assignment.
5. Location of work
6. Dates of employment and termination
7. Ending salary
8. Reason for job termination
   a. Voluntary

      Explanation

   b. Discharge/suspension

      Explanation

   c. Other

      Explanation
9. Statement of termination to be completed by employee
10. Signature and date

The employee's immediate supervisor should complete a final report on the employee being terminated. The final report should contain the following:

1. Employee's name
2. Employee's job assignment
3. Location of work
4. Performance ratings
5. Reason for termination
6. Signature of supervisor and date

POSSIBLE REPERCUSSIONS

Upon termination, the employee may take one or all of the following actions:

1. Accept the termination and seek other employment
2. File a grievance with the district
3. File a complaint with EEOC
4. File a claim with the State Employment Commission for unemployment benefits, or
5. File a suit through a lawyer

The school business administrator has no control over which of the above actions the employee chooses to take. If the administrator has followed the procedures outlined in this paper, he can then answer "yes" to the following questions:

1. Was the rule, regulation, or procedure known to the employee; and could it be considered reasonable and related to the efficient, orderly operation of the school or department?
2. Was the employee notified relative to the expected behavior in this regard, and was there prior knowledge and indication of probable disciplinary consequences for failure to comply on the part of the employee?

3. Was there a fair and objective investigation of the circumstances and the facts prior to discipline; and in fact, was there clear violation or disobedient action?

4. Is there specific data, documentation, and other information that exists to substantiate and verify the situation?

5. Does the disciplinary action taken reflect a degree that is consistent with the seriousness and nature of the offense?

6. Has the employee's previous record been considered, and has that person received treatment that is consistent with the treatment of others who have been disciplined for similar circumstances?

The administrator can then say that he has adhered to the concept of fair play and therefore due process has been afforded the employee.

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